



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**ENVIRONMENT AND LAND COURT DIVISION**  
**ELC CASE NO. 90 OF 2014**

**NJUE MUNGE.....PLAINTIFF (DECEASED)**

**VERSUS**

**JOHNSON KYANDE K. MUCHEMI.....1<sup>ST</sup> DEFENDANT**

**THE OFFICE OF THE ATTORNEY GENERAL (Being sued on behalf of the Land Registrar Embu).....2<sup>ND</sup> DEFENDANT**

**AND**

**TARASIRA WAMBUI P. GICHOVI (As a Legal Representative of the Estate of the deceased Plaintiff).....APPLICANT**

**RULING**

On 30<sup>th</sup> September 2003 the deceased herein (**NJUE MUNGE**) filed this suit at the High Court in Embu seeking orders that the registration of land parcels number GATURI/WERU/948 and 949 be cancelled and be restored to land parcel number GATURI/WERU/174 to be registered in his name. He also prayed for an order for costs and interest.

The basis of that claim was that whereas the deceased was the registered proprietor of land parcel number GATURI/WERU/174 having been issued with a certificate thereof on 16<sup>th</sup> May 1984, the Land Registrar Embu had fraudulently registered the same land in the name of one GITONGA MUTHARANJA who proceeded to sub-divide it into portions number GATURI/WERU/948 and 949.

The 1<sup>st</sup> defendant filed a defence on 28<sup>th</sup> October 2003 denying those averments adding that he had no dealings with GITONGA MUTHARANJA who was a total stranger to him and that he bought parcel number GATURI/WERU/948 from one ROSEMARY RWAMBA.

The 2<sup>nd</sup> defendant did not enter appearance or file a defence and on 24<sup>th</sup> December 2003, the firm of Macharia Muraguri Advocate for the deceased vide letter ref MM/N.M/6/02 requested the Deputy Registrar to enter judgment against the 2<sup>nd</sup> defendant. However, the Deputy Registrar vide letter ref EBU/HCC.53/03 dated 23<sup>rd</sup> January 2004 replied that no judgment could be entered against the 2<sup>nd</sup> defendant as there was no compliance with the provisions of the then **Order IXA Rule 7 of the Civil Procedure Rules**.

However, on 29<sup>th</sup> April 2004, the deceased filed an application seeking judgment against the 2<sup>nd</sup> defendant which was granted by the Deputy Registrar on 24<sup>th</sup> June 2004.

After discovery had made, the matter came up several times for hearing but could not proceed for various reasons. On 23<sup>rd</sup> June 2010 when the matter came up for hearing before **Wanjiru Karanja J** (as she then was), there was no appearance by the deceased or his advocate though served and on the application of counsel then acting for the deceased, Mr. Njeru Ithiga, the Judge dismissed the suit under **Order IXB of the Civil Procedure Rules** as it was then and awarded cost to the defendant.

On 25<sup>th</sup> November 2011, the applicant herein **TARASIRA WAMBUI P. GICHOVI** the legal representative of the Estate of the deceased filed a Notice of Motion dated 19<sup>th</sup> November 2011 seeking the main prayer that she be allowed to proceed with the suit out of time. The applicant followed that application with another Notice of Motion dated 23<sup>rd</sup> February 2012 and filed on 24<sup>th</sup> February 2012 seeking the following substantive orders:-

1. ***That the firm of Beth Ndorongo Adovocates be allowed to come on record in place of Macharia Muraguri Advocate.***
2. ***The Court be pleased to set aside or review the order dismissing the deceased plaintiff's case for non-attendance.***
3. ***An order of prohibition do issue prohibiting all dealings with land parcel number GATURI/WERU/948 and the 1<sup>st</sup> defendant be restrained from felling, destroying indigenous trees until the application is heard and determined.***
4. ***That applicant be allowed to substitute the deceased plaintiff out of time and proceed with the case. Both those applications were supported by the applicant's supporting affidavits dated 15<sup>th</sup> November 2011 and 23<sup>rd</sup> February 2012 respectively.***

The 1<sup>st</sup> defendant filed a replying affidavit to the application dated 23<sup>rd</sup> February 2012 in which he deponed, inter alia, that he is the bona fide registered owner of parcel of land number GATURI/WERU/948 since 1980 and has been in occupation thereof and infact the applicant has been charged in Embu Court Criminal Case No. 1298 of 2012 for obtaining the grant in respect of the deceased's Estate fraudulently and since the deceased died on 25<sup>th</sup> February 2008 the suit abated within one year and this application is being brought almost five (5) years later. There is a further delay in that the applicant obtained the grant of letters of administration on 26<sup>th</sup> July 2011 and there is therefore no reason why this suit should be reinstated. A Notice of Preliminary Objection was also raised that the Court has no jurisdiction to consider both applications which offend the **Civil Procedure Rules**.

Submissions have been filed both by the firm of Beth Ndorongo & Company Advocates for the applicant and Achach and Company Advocates for the 1<sup>st</sup> defendant.

I have considered the applications, the rival affidavits and the submissions by counsels.

The following are not in dispute:-

1. ***The original plaintiff in this case NJUE MUNGE died on 25<sup>th</sup> February 2008 having filed this suit on 30<sup>th</sup> September 2003.***
2. ***Wanjiru Karanja J. (as she then was) dismissed the suit on 23<sup>rd</sup> June 2010.***
3. ***The applicant obtained the grant of letters of administration in respect of the deceased's Estate on 26<sup>th</sup> July 2011 vide Runyenjes Senior Resident Magistrate's Court Succession Cause No. 13 of 2011.***
4. ***The applicant filed the first application to be made a party and proceed with this suit on 25<sup>th</sup> November 2011.***
5. ***The applicant filed a second application on 24<sup>th</sup> February 2012 seeking to be allowed to substitute the deceased and also set aside or review the orders dated 23<sup>rd</sup> June 2010 dismissing***

*the deceased's suit.*

6. *The deceased having died on 25<sup>th</sup> February 2008, this suit abated on 25<sup>th</sup> February 2009.*

The issues that call for my consideration in this application are as follows:-

1. *The effect of the abatement of the suit*
2. *The dismissal order dated 23<sup>rd</sup> June 2010.*
3. *If the suit is infact statute barred*

Order 24 Rule 3 of the Civil Procedure Rules provides as follows:-

*3(1) "Where one of two plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.*

*(2) Where within one year no application is made under Sub-rule (1), the suit shall abate as far as the deceased plaintiff is concerned, and on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the Estate of the deceased plaintiff*

*Provided the Court may, for good reason on application, extend the time"* emphasis added

In her submissions, counsel for the applicant has stated that the suit does not automatically abate and the 1<sup>st</sup> defendant should have made an application to have it declared so. Counsel cited the case of BIJAL MALDE VS SOUTHERN CREDIT BANKING CORPORATION & ANOTHER C.A. CIVIL APPLICATION NO. 56 OF 2008 (NBI). I have looked at that ruling and the Judges did not make any finding to that effect only stating that it was arguable. The Judges delivered themselves as follows:-

*"The applicant's argument before the Superior Court and before us is that the provisions of Order XXIII Rule 3(2) do not automatically take effect upon there being no application for substitution of a representative within one year after the death of the plaintiff. The respondents on the other hand contend that as the word "shall" is used in the rule, the abatement is automatic and there is no need for a Court order to that effect as it is a legal provision. We have anxiously considered the rival views. In our view, as is stated in the case of Githunguri Vs Jimba Credit Ltd (No. 2) supra, we cannot decide on that issue in this ruling as it is not our duty at this stage to pronounce our view on the same. We are of the view, however, that it is an arguable point which requires the Court to ventilate and to give its views upon. Indeed we feel the Court's view on this point may be of grave importance to the development of jurisprudence in this country".*

For my part, having considered the plain meaning of Order 24 Rule 3(2) of the Civil Procedure Rules, my view is that where within one year no application is made to substitute the deceased plaintiff with his legal representative, the suit automatically abates by operation of the law. The defendant is then at liberty to move the Court to award him the costs that he may have incurred in defending the suit. The Court of Appeal has stated that the fact of abatement has to be brought to the notice of the Court, proved and accordingly recorded as an order of the Court – SAID SAANUM VS ATTORNEY GENERAL & OTHERS C.A CIVIL APPEAL NO. 16 OF 2015. The Court addressed that issue as follows:-

*"There have been arguments as to whether or not a formal order is necessary to confirm the fact of abatement ..... From the language of Order 24 Rule 3(2) aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the Court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the Court is necessary for a final and effectual disposal of the suit".*

I think the above adequately answers the issue raised by counsel for the applicant. The fact of abatement is automatic and takes effect as a matter of law and is not dependent on an application to declare it so. Such an order is important however for proper case management to prevent such cases being reflected as part of the Court's backlog.

The deceased having died on 25<sup>th</sup> February 2008 and since no application was made within one year of his death to have his legal representative substituted in his place, there can be no debate about the fate of the suit. It abated. The only issue that calls for my determination is whether there are "**good reasons**" to enable this Court exercise its discretion to extend time or indeed "**sufficient cause**" to revive this suit under **Order 24 Rule 7 of the Civil Procedure Rules**. The applicant obtained the grant in respect of the deceased's Estate on 26<sup>th</sup> July 2011 yet the first of her two applications was filed on 25<sup>th</sup> November 2011 some four months later which delay I consider to be in-ordinate. In the circumstance of this case and which has not been satisfactorily explained, it is also not lost to this Court that the applicant has not been candid in her explanation for this delay. She has not made a full and frank disclosure. In paragraphs 3, 5 and 7 of her supporting affidavit dated 15<sup>th</sup> November 2011, she has deponed as follows:-

**3 "That prior to plaintiff's death, I recently learnt that there existed a land dispute between the deceased**

**and the defendant herein"**

**5 "That I was not aware that the deceased had filed a case in the High Court to claim the land"**

**7 "That I learnt of the existence case (sic) in October 2011 when the advocate on record asked me whether the High Court Case filed by Njue Munge had been concluded".**

In her other supporting affidavit dated 23<sup>rd</sup> February 2012, the applicant has deponed in paragraphs 4 and 5 as follows:-

**4 "That I was not aware that the instant suit existed and I urge the Court to excuse the delay in applying reinstatement of this case"**

**5 "That I learnt of the existence of suit through the Advocate on record when I gave her instructions in another matter".**

On her part, **BETH N. NDORONGO** advocate for the applicant also swore an affidavit dated 15<sup>th</sup> November 2011 in which she has deponed in paragraphs 2, 3 and 4 as follows:-

**2 "That I vaguely recalled that at one time in either year 2006 and 2007 I heard the deceased here mentioned in Court"**

**3 "That I asked the applicant if the deceased had concluded his case in the High Court"**

**4 "That the applicant informed me that she was not aware of the case"**

Clearly therefore, the applicant's advocate brought to her attention about this case way back in 2006 or 2007. If she was vigilant enough, she should have made enquiries that early from the local Court. No evidence has been availed to show that she did that. No suggestion that the file was misplaced. In the absence of sufficient explanation for the delay, this Court has no material on which to exercise its discretion in the applicant's favour and revive this suit or enjoin her in the same. That application must therefore be dismissed.

The suit itself was dismissed by **Wanjiru Karanja J** (as she then was) on 23<sup>rd</sup> June 2010 in the absence of the deceased plaintiff. This Court no doubt has the discretion to set aside any ex-parte orders obtained in the absence of the other party. In doing so, the main concern of the Court is to do justice to the

parties. However, such discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice – **SHAH VS MBOGO 1967 E.A 116**. See also **PATEL VS E.A CARGO HANDLING SERVICES 1974 E.A 75**. However, this suit having abated on 25<sup>th</sup> February 2009, the order by **Wanjiru Karanja J** (as she then was) dismissing it on 23<sup>rd</sup> June 2010 was really an act in vain because un-known to the Judge, there was no suit to dismiss. Nothing can be gained by setting aside or varying that order of dismissal because the substratum on which it was premised had ceased to exist a year earlier. That application to set aside or review the orders of **Wanjiru Karanja J** (as she then was) dated 23<sup>rd</sup> June 2010 must similarly be dismissed.

Finally, although the issue of limitation was not addressed by counsel in their submissions, the 1<sup>st</sup> defendant filed a Preliminary Objection on 1<sup>st</sup> March 2006 giving notice that he would be raising a point of law that this suit is time barred under the **Limitation of Actions Act**. Under **Section 7 of the Limitation of Actions Act**, a suit to recover land may not be brought after the end of twelve years from the date in which the right of action occurred. However, where fraud is pleaded, as is the case herein, time runs from the time the plaintiff discovers the fraud or could have with reasonable diligence discovered it. Limitation is a matter of law which a Court can raise in limine as it goes to jurisdiction. The plaint herein was filed on 30<sup>th</sup> September 2003 and the land parcel number GATURI/WERU/948 was registered in the names of the 1<sup>st</sup> defendant on 16<sup>th</sup> August 1980 as per paragraph 12 of the plaint. Particulars of fraud are only alleged against the 2<sup>nd</sup> defendant but it is not even clear from the pleadings when this fraud was discovered. What is clear is that at least by 1992, this claim became statute barred.

Counsel for the applicant has submitted that since there is a judgment against the 2<sup>nd</sup> defendant, it is only fair that this suit be reinstated to hearing. It is true that a judgment was entered against the 2<sup>nd</sup> defendant on 24<sup>th</sup> June 2004. However, the deceased plaintiff was required to formally prove his case against the said 2<sup>nd</sup> defendant (Attorney General). That was not done and the application for revival and substitution having been dismissed, that will now not be possible.

In view of all the above, the applicant's Notice of Motion dated 19<sup>th</sup> November 2011 and the one dated 23<sup>rd</sup> February 2012 are both dismissed with costs to the 1<sup>st</sup> defendant.

**B.N. OLAO**

**JUDGE**

**1<sup>ST</sup> APRIL, 2016**

Ruling delivered this 1<sup>st</sup> day of April 2016 in open Court

Mr. Odunga for Mr. Achach for 1<sup>st</sup> Defendant present

Ms Ndorong for Plaintiff absent

Plaintiff present.

**B.N. OLAO**

**JUDGE**

**1<sup>ST</sup> APRIL, 2016**